

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOHN A. PARKINS, JR.
JUDGE

**NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
TELEPHONE: (302) 255-2584**

APRIL 8, 2009

Ronald L. Stoner, Esquire
Ronald Stoner, P.A.
1107 Drummond Plaza
Newark, Delaware 19711-5705

Gilbert F. Shelsby Jr., Esquire
Shelsby & Leoni
221 Main Street
Stanton, Delaware 19804

Re: Jubb v. Thomas Dougherty, D.M.D., et al
C. A. No. 08C-07-199 - JAP

Dear Counsel:

The defendant has asked the Court to determine the sufficiency of the Affidavit of Merit filed by the plaintiff. For the reasons which follow, the Court declines to do so.

A. The Claims

The defendant is a board certified maxillofacial surgeon who consulted with Christopher Jubb, a minor and his parents about problems with the alignment of Christopher's jaw. Dr. Dougherty recommended that Christopher ultimately undergo orthognathic surgery, a process in which the jaw is cut and teeth are repositioned. Dr. Dougherty recommended delaying the surgery because Christopher was not yet done growing, but recommended prompt extraction of Christopher's four wisdom teeth and an

extra tooth on his upper left jaw. The Jubbs agreed and scheduled a follow-up appointment with Dr. Dougherty for the extractions.

Christopher's father brought him to the follow-up appointment. An employee of Dr. Dougherty informed Mr. Jubb that, in addition to the five aforementioned extractions, a sixth tooth on Christopher's lower jaw would also be removed. Mr. Jubb and his son objected to the additional extraction. According to the Complaint "Christopher Jubb's father reluctantly signed the consent form."¹ The tooth was extracted, apparently the same day.

Plaintiff's claim sounds in negligence. She alleges that the defendant "failed to exercise that degree of skill and care ordinarily employed in the same or similar field of medicine as the defendant." At the same time plaintiff filed her complaint she filed an affidavit of merit in which an ostensible expert opined that there is reason to believe Dr. Dougherty departed from the applicable care and that this departure proximately caused injury to Christopher. The defendant now asks this Court to review that affidavit and determine whether it complies with 18 *Del. C.* §6853.

*B. Plaintiff is not required
to file an Affidavit of Merit*

In 2003 the General Assembly amended the Medical Negligence Act² to reduce the number of meritless medical negligence suits by requiring that the plaintiff file an Affidavit of Merit at the time he or she files suit.³ Section

¹ Complaint, ¶ 13.

² 18 *Del. C.* ch. 68

³ 18 *Del. C.* §6853. There are limited exceptions to this requirement. Because of the Court's resolution of this matter, those exceptions need not be considered.

6853 now provides in pertinent part that “[n]o healthcare negligence lawsuit shall be filed in this State unless the complaint is accompanied by [an] Affidavit of Merit.” By its terms, therefore, the Affidavit of Merit is required only in “healthcare negligence lawsuit[s].”

This is not a “healthcare negligence lawsuit.” The term “healthcare provider” is defined elsewhere in the Act as “a person.... licensed by this State pursuant to Title 24, *excluding Chapter 11*”⁴ Dentists are licensed pursuant to chapter 11 of title 24,⁵ and therefore are excluded from the definition of “healthcare provider.”⁶ Accordingly plaintiff had no obligation to file an Affidavit of Merit and the Court will therefore decline to review the one she submitted.

It is **SO ORDERED**.

Very truly yours,

John A. Parkins, Jr.

cc: Prothonotary

⁴ 18 *Del.C* §6801(5).

⁵ 24 *Del.C* § 1124.

⁶ *Ragazzo v. Truono*, 1989 WL 40922 (Del. Super. April 12, 1989).